United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7058

ORIGINAL

To be argued by
ELI SAUL COHN

In The

United States Court of Appeals

For The Second Circuit

MORGAN ASSOCIATES, a Joint Venture of TERMINAL CONSTRUCTION CORPORATION, THE DIC CONCRETE CORPORATION, UNDERHILL CONSTRUCTION CORP. and NAGER ELECTRIC COMPANY, INC.,

Plaintiff-Appellant,

- against -

UNITED STATES POSTAL SERVICE, ELMER T. KLASSEN, POSTMASTER GENERAL, JAMES J. WILSON, ASSISTANT GENERAL COUNSEL, UNITED STATES POSTAL SERVICE, CONTRACTS AND PROPERTY DIVISION,

Defendants-Appellees,

NAB-LORD ASSOCIATES, a Joint Venture of NAB CONSTRUCTION CORP. and LORD ELECTRIC CO., INC.,

Intervenor-Appellee.

BRIEF FOR INTERVENOR-APPELLEE

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MORGAN ASSOCIATES, a Joint Venture of
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-against-

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- x

STATEMENT OF CASE

Appellant Morgan Associates seeks to prevent the award of a Fifty-one Million Four Hundred Eighty-four Thousand Dollar ($51,484,000) contract for the reconstruction and mechanization of the United States Post Office Morgan Station in the City of New York.

As an unsuccessful bidder, appellant seeks judicial review prior to the award of the contract by the Postal Service to the Intervenor.

Appellant asks this Court to make the following determinations to find it has standing to maintain the injunctive suit:

1. Overturn the doctrine of Perkins v. Lukens Steel Co., 310 U.S. 113 and Edelman v. Federal Housing Administration, 382 F. 2d 594.

2. Ignore the mandate of the United States Postal Reorganization Act which specifically exempts the Postal Service from the Administrative Procedure Act (39 U.S.C.§ 410 (a)).

3. Adopt the reasoning of Scanwell Laboratories, Inc. v. Shaffer, 424 F. 2d 859 (D.C. Cir. 1970) although it was based upon standing afforded under the Administrative Procedure Act (5 U.S.C. § 702).

4. Find that agency discretion is reviewable although

(a) the regulation grants discretion, and

(b) there are no allegations of fraud, collusion or bribery.

5. Adopt the view that unsuccessful bidders are aggrieved parties under all circumstances entitled to judicial review of bidding and public letting of contracts.

The Court below refused to make these determinations and should be affirmed.

ARGUMENT

POINT I

THE RULE THAT AN UNSUCCESSFUL BIDDER DOES NOT HAVE STANDING TO CONTEST THE LEGALITY OF THE BIDDING PROCEDURE IS THE LAW OF THIS CIRCUIT.

Edelman v. Federal Housing Administration, 382 F. 2d 594 and Perkins v. Lukens Steel Co., 310 U.S. 113, 60 Sup. Ct. 869, clearly proscribed judicial review for reasons that are as compelling today as they were then.

> ". . . Courts should not, where Congress has not done so, subject purchasing agencies of Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional governmental practice and would create a new concept of judicial controversies. A like restraint applied to purchasing by private business would be widely condemned as an intolerable business handicap. It is, as both Congress and the courts have always recognized, essential to the even and expeditious functioning of Government that the administration of the purchasing machinery be unhampered. . . ."

Perkins v. Lukens Steel Co., supra, at p. 130.

The Court is respectfully referred to Gary Aircraft Corp. v. United States, 342 F. Supp. 473, 477 (U.D. Tex. 1972) which followed the doctrine of Perkins upon the simple proposition that it had never been overruled by

the Supreme Court. There is no evidence of any legislative intent to overturn the fundamental principle that government contracting is for the benefit of the Government and not for the benefit of potential bidders.

In an attempt to distinguish Perkins and Edelman, appellant argues that the finding which precludes an unsuccessful bidder from status to institute a review proceeding is, in Perkins, obiter dicta. This is urged although every case subsequent to Perkins, including Edelman, adopts this proposition. Even Scanwell, supra, does not advance the specious argument of dicta.

Appellant next seeks to distinguish Edelman by suggesting a significant difference between an unsuccessful bidder with respect to a specific contract and possible bidders to potential contracts. There is no distinction because in both instances the bidding procedures would be the subject of a review contrary to the public policy that bidding is for the benefit of the Government and not for the unsuccessful or potential bidder.

Intervenor relies on Perkins, Edelman and Gary Aircraft, supra.

POINT II

EVEN UNDER SCANWELL DOCTRINE THERE IS NO STANDING TO SUE WHERE THERE IS A LEGISLATIVE INTENT TO PREVENT REVIEW.

The appellant's main thrust in this appeal is that this Court should adopt the reasoning of Scanwell v. Shaffer (supra). The departure of Scanwell from the Perkins doctrine was a finding that the status to bring a suit as an aggrieved person was acquired through the Administrative Procedure Act, 5 U.S.C. §702. The appellant in Scanwell urged that it could seek review of a contract award:

> ". . . which is in violation of the regulations governing the issuance thereof by virtue of Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702, Sup. C. IV 1965-68 which provides 'a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof.' . . ."

Scanwell, supra, at p. 861.

Scanwell distinguishes Perkins upon the ground that it was decided before the passage of the Administrative Procedure Act and that the legal right doctrine was no

longer applicable. But only if Congress did not preclude judicial review or withdraw it by appropriate legislation could standing be predicated on the APA (Scanwell, supra 865).

Even if it is assumed that Scanwell establishes the general proposition of judicial review, irrespective of the APA, a legislative intent to the contrary must be given precedence. Scanwell, supra, 866, Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 154.

Every case that follows Scanwell finds an aggrieved party with standing to sue solely because of the applicability of the Administrative Procedure Act. Judge Pollack correctly viewed the Scanwell doctrine as being limited to aggrieved persons who have standing by virtue of either a specific statute granting the right to review or by Section 10 of the Administrative Procedure Act (5 U.S.C. 702). Appellant cannot reach either of these pedestals defined within the Scanwell doctrine.

Judge Tamm, the author of Scanwell, made it clear in Blackhawk Heating v. Driver, 430 through F. 2d 1137, 1140 (D.C. Cir. 1970) that Scanwell is grounded upon the

Administrative Procedure Act (APA).

> "As we held in Scanwell Laboratories and Ballerina, one who alleges that an agency has acted arbitrarily or in excess of its authority in denying him a government contract is a proper party to 'satisfy the public interest in having agencies follow the regulations which control government contracting.' Scanwell Laboratories, supra, 137 U.S. App. D.C. at 376, 424 F. 2d at 864. It was stated that one who could demonstrate that the government had abused its discretion in contracting would be permitted to sue in the district court to vindicate the public interest as a 'private attorney general' under section 10 of the Administrative Procedure Act." (emphasis added)

Blackhawk Heating, supra, at p. 1140.

The Postal Reorganization Act provides in Section 410 (a) that Chapters 5 and 7 of Title 5 (APA), shall not apply to the "exercise of powers of the Postal Service". If it is suggested that the APA is a codification of existing law at the time of passage, then Congress by excluding the Postal Service from judicial review under the APA does also preclude judicial review under any prior existing law.

This exclusion of the APA by the Postal Reorganization Act is consistent with Section 701 of the APA, subdv. (a) (1) which contemplated the enactment of

other statutes which would preclude judicial review. Where Congress in limited instances desired the Postal Service to be subject to the APA, it did so, as in Section 3001 (f) of the Postal Reorganization Act (39 U.S.C.§3001).

In conclusion, appellant has no standing under: (a) the Administrative Procedure Act because it is excluded by the Postal Reorganization Act and (b) any other specific legislative enactment. Therefore, standing would have to be predicated upon the bald assertion that an unsuccessful bidder has a general right of review of the bidding procedures of an agency of the United States Government, and this, it is respectfully suggested, is not the law.

POINT III

THE PROCUREMENT REGULATION IN ISSUE PERMITS AGENCY DISCRETION WHICH IS NOT SUBJECT TO REVIEW.

The appellant's complaint is that a proposed sub-contractor of the Intervenor now employs persons who were previously involved with the independent design engineering firm that prepared the plans and specifications for only the mechanization portion of the project.

Specification 18-511 of the United States Postal Service Facilities Contracting Bulletin dated June 12, 1974, No. 74-2, reads as follows:

> "No contract for construction of a project shall be awarded to a firm or person that designed the project, except with the approval of the Assistant Postmaster General, Real Estate and Building Department or his authorized designee."

If all the allegations of appellant were true, the defendants still have the discretionary right to award the contract to the person or firm who designed the project. Even if the plaintiff had standing under the APA generally, the Act does not grant standing where "agency action is committed to agency discretion by law." 5 U.S.C.§701 (a)(2), Curtiss-Wright v. McLucas, 364 F.

Supp. 750, 763 (1973).

In addition, where any statute commits agency action to discretion, it is not reviewable apart from the APA. This is so, unless there is fraud, bribery or collusion. The Court of Appeals of the District of Columbia Circuit restricted its Scanwell doctrine to this effect in Wheelabrator Corp'n v. Chafee, 455 F. 2d 1306 (1971) where, at page 1311, it said:

> "The foregoing establishes the need for reversal. We need not consider in this case whether this analysis slams the door to the courthouse air-tight, or whether it may be opened for a peek in limited cases, --e.g., where there is a claim that the court's general lack of review authority is subject to an exception because of extrinsic facts, such as fraud or bribery, that undercuts any bona fide defense that the matter rests solely within the Secretary's discretion. Perhaps by analogy to rulings made in other instances where the court is generally without jurisdiction of a challenge to official action there is a limited exception if the pleading papers establish on their face, without any burrowing into the administrative file, that the agency action violates a clear command of the governing law, and that no state of facts may reasonably be conceived that would justify the administrative action."

Appellant contends that it has standing because of the violation of the defendant's administrative regulation. This regulation grants defendant agency discretion. Moreover, the agency has considered the appellant's protest; has interpreted its discretionary regulation and has found no violation (85). The Court should defer to the agency's determination.

In Udall v. Tallman, 380 U.S. 1 at page 16, when considering the construction of a discretionary administrative regulation, the Court said:

> ". . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.
>
> 'Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt . . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' Bowles v. Seminole Rock Co., 325 U.S. 410, 413-414.
>
> In the instant case, there is no statutory limitation involved. While Executive Order No. 8979 was issued by the President, he soon delegated to the Secretary full power to withdraw lands or to modify or revoke any

> existing withdrawals. See Executive Order No. 9146, 7 Fed. Reg. 3067; Executive Order No. 9337, 8 Fed. Reg. 5516; Executive Order No. 10355, 17 Fed. Reg. 4831. Public Land Order No. 487 was issued by the Secretary himself."

Appellant dreams of an implied contract theory of fair bidding wrenched from Edelman. The regulation gives notice to all bidders that the Postal Service may award to a design firm. Nothing else is implied.

Appellant now seeks to read into the "implied contract theory of fairness" the further obligation upon the Postal Service to have advised all bidders that it intended to exercise its discretion with respect to this particular procurement.

In the face of the authorized exercise agency discretion by the Postal Service, this appellant has no standing.

CONCLUSION

(a) Appellant, an unsuccessful bidder, does not have standing to contest the legality of the bidding procedure (Edelman v. FHA, supra).

(b) Legislative intent (Postal Reorganization Act §410 (a)), precludes judicial review and therefore denies the appellant standing to sue.

(c) The defendants are granted agency discretion to award the contract to the designer by the valid regulation in issue 18-511, again depriving appellant of standing.

(d) There is no common law right of review by an unsuccessful bidder.

The order below dismissing the complaint for lack of standing to sue should be affirmed.

Dated: February 3, 1975

Respectfully submitted,

McDonough, Schneider, Marcus,
Cohn & Tretter
Attorneys for Intervenor-
Appellant

Eli Saul Cohn
Franklin E. Tretter
Of Counsel

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATE COURT OF APPEALS: SECOND CIRCUIT

Index No.

MORGAN ASSOC.,
Plaintiff-Appellant,

- against -

US POSTAL SERVICE, et al,
Defendants-Appellees.

Affidavit of Personal Service

STATE OF NEW YORK. COUNTY OF *ss.:*

I. Victor Ortega, *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the 5th *day of* February *19* 75 *at* *

deponent served the annexed Brief for Intervenor-Appellee *upon*

*

the *in this action by delivering* 2 *a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein,*

Sworn to before me, this 5th
day of February *19* 75

Victor Ortega
VICTOR ORTEGA

* M. Carl Levine, Morgulas & Forman, 747 Third Ave.
New York, New York

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

U.S. Court of Appeals: Second Circuit — Index No.

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Sworn to before me, this 6th *day of* February *1975*

Robert T. Brin

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
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